In The

Supreme Court of the United States

October Term, 1977

No. 77-106

RICK E. TRUDO,

Petitioner,

vs.

THE STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

RICHARD C. TURNER
Attorney General of Iowa
State Capitol
Des Moines, Iowa 50319

RAY SULLINS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorneys for Respondent

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

CITATIONS

Cases:

CITATIONS—Continued

CITATIONS—Continued

In The

Supreme Court of the United States

October Term, 1977

No. 77-106

RICK E. TRUDO,

Petitioner,

vs.

THE STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Iowa Supreme Court, *State v. Trudo,* 253 N. W. 2d 101 (Iowa 1977), is set forth in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was Petitioner denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because of the trial court's order that the two charges pending against Petitioner be tried jointly?

2. Was Petitioner denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the trial court's refusal to entertain Petitioner's motion to suppress made after the time prescribed by local rule of practice for the making of such motions?

—o—

STATEMENT OF THE CASE

On October 5, 1975, officers of the Des Moines, Iowa, Metropolitan Area Narcotics Squad went to Petitioner's residence to execute a search warrant. They came in contact with Petitioner, indicated that they knew Petitioner's roommate, and said that they wanted to buy some marijuana from the roommate. Petitioner replied that he supplied his roommate and invited the officers inside the house. The parties then negotiated and agreed upon a price for the sale of a quantity of marijuana. Petitioner left the house and returned a few minutes later with five (5) pounds of marijuana. Petitioner then told the officers to pick the pound which they wanted and accepted the officers' payment for the one which they selected. The officers then arrested Petitioner and executed the search warrant, seizing the other four pounds of marijuana and assorted paraphernalia.

On November 6, 1975, Petitioner was charged by separate county attorney informations with delivery of marijuana and possession of marijuana with intent to deliver, both in violation of § 204.401 (1) of the Code of Iowa. Trial on both charges was set for January 5, 1975. Petitioner was arraigned November 12, 1975. On December 15, 1975, the trial court *sua sponte* ordered the consolidation for trial of the two charges against Petitioner. On December 24, 1975, Petitioner filed a motion to suppress certain evidence obtained in the search of his premises. On December 26, 1975, the motion was overruled as untimely under Local Rule of Practice 26 (F), which requires that all pre-trial motions be made within 17 days of arraignment. On January 5, 1976, the date of trial, Petitioner took exception to both rulings.

At trial, Petitioner objected to testimony on the same grounds as stated in his untimely suppression motion and renewed his objection in a motion at the close of the State's evidence. All such objections and motions were overruled. On January 7, 1976, Petitioner was convicted of both offenses and on February 6, 1976, was sentenced to concurrent sentences of five years in the Iowa Men's Reformatory. The Iowa Supreme Court affirmed the conviction on April 20, 1977.

—o—

ARGUMENT

Petitioner suggests that the trial court erred in *sua sponte* ordering the consolidation of the possession and delivery of marijuana charges pending against him. In its consideration of this case, the Iowa Supreme Court

held, as a matter of state law, that the trial court had the authority to consolidate the two charges pending against Petitioner for a single trial. *State v. Trudo,* 253 N. W. 2d 101, 104 (Iowa 1977). This holding was in conformity with the practice of the majority of the states and with that recommended by the American Bar Association. 2 Wharton's Criminal Procedure § 302 (12 Ed. 1975); Annot., 59 A. L. R. 2d 841 (1958); ABA Standards Relating to Joinder and Severance § 3.1 (a), at 46-47 (Approved Draft, 1968). The only question remaining is whether such a rule violates the Due Process Clause of the Fourteenth Amendment. Respondent submits that it does not.

The Iowa Supreme Court specifically pointed out that either the defendant or the State could move for severance after the trial court's joinder order. *State v. Trudo, supra* at 104. Petitioner never formally made such a motion, but merely "took exception" to the ruling. Petitioner's Brief at 4. Petitioner clearly had a duty to make motion for severance, even under prevailing federal standards. *United States v. Franklin,* 452 F. 2d 926 (8th Cir. 1971). The State contends that such a procedure was insufficient to preserve any alleged error in this respect, and that the petition should be denied on that basis.

Assuming *arguendo* that error has been preserved, it is clear that no due process violation occurred from the joinder of the charges. Iowa Code § 204.408 (1975), the statutory provision under which the trial court proceeded, is similar in effect to Rule 14, Federal Rules of Criminal Procedure, since both allow severance of charges where a joint trial would substantially prejudice the defendant. Rule 14 has been interpreted as providing three bases for

a finding of prejudice: (1) that the jury may cumulate evidence of the separate crimes; (2) that the jury may improperly infer criminal disposition from one charge and treat it as evidence of guilt on the other; or (3) that the defendant may be confounded or embarrassed in presenting defenses to the separate charges in a single trial. *Blunt v. United States,* 404 F. 2d 1283 (DC Cir. 1968), cert denied 394 U. S. 909 (1969). Assuming (without conceding) that these tests represent the minimum standard of due process, that standard was met in this case.

The first two reasons are not applicable to this case, since the evidence on the possession charge would have been admissible on the delivery charge since both arose out of the same transaction and involve common elements of proof. *United States v. Rajewski,* 526 F. 2d 149 (7th Cir. 1975); *United States v. Abshire,* 471 F. 2d 116 (5th Cir. 1972); *Robinson v. United States,* 459 F. 2d 847 (DC Cir. 1972); *Baker v. United States,* 401 F. 2d 958 (DC Cir. 1968); *Blunt v. United States, supra.* Since this is true, only the third reason—the interference with the raising of a defense—could be a ground for reversal. The burden of making such a showing is on Petitioner. *Blunt v. United States, supra.* Absent a convincing demonstration of a need to testify on one charge and to refrain from testifying on the other sufficient to outweigh the interest of judicial economy gained by the joint trial, the motion for severance will be denied. *Baker v. United States, supra*; *Wangrow v. United States,* 399 F. 2d 106 (8th Cir. 1968), cert denied 393 U. S. 933 (1968). Such a decision will be reversed only where it constitutes an abuse of discretion by the trial court. *United States v. Park,* 531 F.

2d 754 (5th Cir. 1976); *Blunt v. United States, supra.* Here, Petitioner neither presented any evidence nor suggested any specific way in which such prejudice occurred. Therefore, no error was committed in ordering a joint trial of the charges. *Blunt v. United States, supra.*

Petitioner suggests an additional ground for the granting of a writ of certiorari in this case in the trial court's holding that he had waived his right to object to the admissibility of certain evidence introduced at trial by his failure to comply with a local procedural rule placing a time limit upon such motions. The Iowa Supreme Court has held, as a matter of state law, that the trial court had authority to enact such rules. *State v. Trudo, supra; Iowa Civil Liberties Union v. Critelli,* 244 N. W. 2d 564 (Iowa 1976). Therefore, the only remaining question is whether such a rule operates so as to deny a defendant due process of law. Respondent submits that it does not.

While it is true that a procedural default in a state court will not bar review of a federal constitutional claim in this Court where to do so would be "to force resort to an arid ritual of meaningless form," such a default will bar review where the rule serves a "legitimate state interest" and the defendant's conduct thwarts affectuation of the policy behind the rule. *Henry v. Mississippi,* 379 U. S. 443, 448-449 (1965). An examination of Local Rule 26 (F) and the analogous federal provision, Rule 41 (f) and 12 (b) of the Federal Rules of Criminal Procedure, will reveal that there are strong interests behind the rules which justify denial of relief in this case.

In *Iowa Civil Liberties Union v. Critelli, supra,* the Iowa Supreme Court detailed the backlog of cases pending in the Polk County District Court (in which Petitioner was tried) in November, 1975, only two months prior to Petitioner's trial. This backlog of cases seriously impeded the ability of the State to comply with Iowa Code § 795.2 (1975), which requires that a criminal defendant be tried within sixty days of his indictment or the filing of an information by the County Attorney, a provision designed to implement the Sixth Amendment right to a speedy trial. *State v. Satterfield,* 257 Iowa 1193, 1195, 136 N. W. 2d 257, 258 (1965).

The cases under the Federal Rules of Criminal Procedure, which provide for a waiver of the right to raise a Fourth Amendment claim if not made by a time prescribed by the court, identify other reasons for the rule, such as avoidance of trial interruptions which may interfere with the continuity of the jury's attention and which may lessen the deterrent effect of the criminal sanction, avoidance of inconvenience to jurors and witnesses caused by delays during trial, avoidance of waste of judicial and prosecutorial resources where the defendant prevails and trial is unnecessary, and the effectuation of the government's right to take an interlocutory appeal from an adverse decision. *United States v. Mauro,* 507 F. 2d 802 (2d Cir. 1974), cert denied 420 U. S. 991 (1975). As this Court recognized in *Segurola v. United States,* 275 U. S. 106, 111-112 (1927):

> "[E]xcept where there has been no opportunity to present the matter in advance of trial (citations), a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles or

> personal property . . . because the court will not in trying a criminal case permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly process of a cause and consider a question which has happened to cross the path of such litigation and is wholly independent of it."

Thus, the federal courts have frequently declined to hear a claim that evidence was the product of an illegal search and seizure where that claim was not raised prior to trial as required by Rule 12. *United States v. Farnkoff,* 535 F. 2d 661 (1st Cir. 1976); *United States v. Peterson,* 524 F. 2d 167 (4th Cir. 1975), cert denied 423 U. S. 1088 (1976); *United States v. Rollins,* 522 F. 2d 160 (2d Cir. 1975), cert denied 424 U. S. 918 (1976); *United States v. Mauro, supra.* To hold otherwise would frustrate the purposes of the rule, even though an (untimely) objection was made.

Petitioner's reliance on the deliberate bypass standard used in habeas corpus cases is unavailing, since this Court has now made clear that failure to comply with Rule 12 (b) or a state equivalent thereof constitutes a bar even to habeas relief. *Wainwright v. Sykes,* — U. S. —, 97 S. Ct. 2497 (1977); *Francis v. Henderson,* 425 U. S. 526 (1976); *Davis v. United States,* 411 U. S. 233 (1973). See *Estelle v. Williams,* 425 U. S. 501, reh. denied 426 U. S. 954 (1976). Where a party fails to assert or to prove good cause for such a procedural default, as Petitioner has failed to do, federal consideration of his claims, either on direct appeal or in a collateral attack, is barred. The petition in this case should be denied on the grounds that Petitioner's procedural default in the state courts precludes review in this Court.

CONCLUSION

The trial court did not violate Petitioner's due process rights by ordering consolidation of the two charges against him. The charges could have been brought in a single information under Iowa law, and the Iowa Supreme Court followed the practice of the majority of the states in holding that the trial court could *sua sponte* consolidate the charges. Applying the standards established by the Court in the Federal Rules of Criminal Procedure, the trial court was well within its discretionary powers in refusing to order separate trials, even assuming that Petitioner adequately preserved the error.

Petitioner's due process rights were not violated by the trial court's refusal to entertain Petitioner's untimely motion to suppress certain evidence. Local Rule 26 (F) is similar in effect to the Federal Rules of Criminal Procedure promulgated by this Court and is justified by strong state interests. Failure to comply with such a rule bars federal review of Petitioner's claims. The federal courts have given the federal rules a similar effect, and this Court has repeatedly denied certiorari in such cases.

Since the rules promulgated by this Court are similar to and would lead to the same result as the rules established by the Iowa courts, it is beyond peradventure that no due process violation occurred in this case. This case is not one in which "a state court has decided a federal question of substance . . . in a way probably not in accord with the applicable decisions of this court." Rule 19,

Rules of the United States Supreme Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa
State Capitol
Des Moines, Iowa 50319

RAY SULLINS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Ray Sullins, Assistant Attorney General for the State of Iowa, hereby certify that on the 22nd day of September, 1977, I mailed three (3) copies of the Brief for Respondent in Opposition, correct first class postage prepaid, to:

Phillip F. Miller
900 Des Moines Building
Des Moines, Iowa 50309

I further certify that all parties required to be served have been served.

RICHARD C. TURNER
Attorney General of Iowa
State Capitol
Des Moines, Iowa 50319

RAY SULLINS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorneys for Respondent